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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/761,013	01/20/2004	William J. Vroon	BRP / 204	1651
26875 7590 11/01/2007 WOOD, HERRON & EVANS, LLP 2700 CAREW TOWER 441 VINE STREET CINCINNATI, OH 45202			EXAMINER GROSSO, HARRY A	
			ART UNIT 3781	PAPER NUMBER
			MAIL DATE 11/01/2007	DELIVERY MODE PAPER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/761,013
Filing Date: January 20, 2004
Appellant(s): VROON, WILLIAM J.

MAILED
NOV 01 2007
GROUP 3700

J. Dwight Poffenberger, Jr.
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed August 31, 2007 appealing from the Office action mailed July 2, 2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: In the rejection for claim 2 the appellant has provided the wrong patent number for the Budowski et al reference. The correct number is 6,827,231.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,725,118	SLAGER et al	3-1998
4,828,132	FRANCIS, Jr. et al	3-1989
4,172,623	ANDERSON	10-1979
1,163,696	SILBERMAN	12-1915
6,827,231	BUDOWSKI et al	12-2004
6,540,096	BAZANY et al	4-2003

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1, 3, 4, 9, 10, 12, 15, 16, 17, 24, 25, 27, 45-49, 51-53, 55-58 and 60-62 rejected under 35 U.S.C. 103(a) as being unpatentable over Slager, of record in view of Francis, Jr., Silberman, both of record and Anderson (4,172,623).

3. Regarding claims 1, 10, 16, 24, 25, 56 and 61, Slager discloses a stackable horizontal dispensing container with a pallet base (12), a pallet cover (16, Figure 3, column 7, line 63 to column 8, line 12) and a three sided sleeve that is removably secured to the base and the cover.

Slager discloses the invention with the sleeve made from plastic but does not teach the sleeve being made of corrugated plastic material with vertically oriented corrugations. Francis, Jr. discloses a container with a pallet base, a pallet cover and a sleeve and the sleeve is constructed from corrugated plastic with the corrugations extending vertically to resist bowing in a direction along the length or width of the container because the corrugated material provides increased resistance to bending (Figures 1-3, column 3, lines 5-25). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of corrugated plastic panels as disclosed by Francis, Jr. in the container disclosed by Slager because the use of corrugated material provides increased resistance to bending.

Slager discloses the invention except for fasteners extending through the pallet base, pallet cover and sleeve. Silberman discloses a container with a fastener extending through a pallet base the sleeve (sidewalls) and the cover to secure the parts to form the container (Figures 1-5, page 1, lines 42-71) and make it strong and rigid. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of fasteners extending through the pallet base cover and sleeve as disclosed by Silberman in the container disclosed by Slager to provide a container that is strong and rigid.

Slager discloses the invention but does not teach a rectangular frame with an open interior. Anderson discloses a horizontal dispensing container with a rectangular metal frame secured to the opening to provide rigidity to the container (11, Figure 1, column 1, lines 59-66 and column 2, lines 55-68 and column 3, lines 5-8). It would have

been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of a frame as disclosed by Anderson in the container disclosed by Slager to provide rigidity to the container.

4. Regarding claim 3, Slager discloses the sleeve is made of multiple pieces joined together by the cover.

5. Regarding claims 9, 27 and 46, Slager as modified by Francis Jr., Silberman and Anderson discloses the invention and Anderson further discloses the frame is secured to the sleeve with fasteners (column 3, lines 21-27).

6. Regarding claim 12, Slager discloses the container is stackable; hence a second pallet base would be stacked on the pallet cover (column 7, lines 63-65).

7. Regarding claim 15, Slager as modified by Francis Jr., Silberman and Anderson discloses the claimed invention except for the sleeve being less than twenty millimeters thick. It would have been an obvious matter of design choice to make the sleeve of Slager with a thickness of less than twenty millimeters, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

8. Regarding claims 45, 47, 60 and 62, Slager discloses a horizontal brace, the lip (22) attached to the pallet cover.

9. Regarding claims 51 and 55, Slager as modified by Francis Jr., Silberman and Anderson discloses the invention with Slager disclosing a horizontal brace, the lip (22) attached to the pallet cover and Anderson further disclosing the frame is secured to the

Art Unit: 3781

sleeve with fasteners (column 3, lines 21-27). The horizontal brace is an integral part of the cover and, as such, the fastener extending through the cover also is extending through the brace.

10. Regarding claims 4, 17, 48, 49, 52, 53, 57 and 58 Slager discloses dunnage in the container that consists of intersecting partitions.

11. Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Slager as modified by Francis Jr., Silberman and Anderson in view of Budowski et al, of record. Slager as modified by Francis Jr., Silberman and Anderson discloses the invention except for the sleeve being made of one piece of material. Budowski discloses a horizontal dispensing container with the sleeve made of one piece of material (Figures 1 and 3a-3d, column 6, lines 34-54). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of a sleeve made of one piece of material as disclosed by Budowski et al in the container disclosed by Slager as modified by Francis Jr., Silberman and Anderson to provide a tighter, more stable container and simplify assembly.

12. Claims 6, 19, 50, 54 and 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Slager as modified by Francis Jr., Silberman and Anderson in view of Bazany, of record. Slager as modified by Francis Jr., Silberman and Anderson discloses the invention except for the use of pouches as dunnage. Bazany disclose a horizontal dispensing container with pouches for dunnage since pouches are commonly use for transporting auto parts (40, Figure 1, column 8, lines 14 to 29) It would have been obvious to one of ordinary skill in the art at the time the invention was made to have

Art Unit: 3781

incorporated the use of pouches for dunnage as disclosed by Bazany in the container disclosed by Slager as modified by Francis Jr., Silberman and Anderson because it is known in the art to use pouches for transporting items such as auto parts in this type of container.

13. Claims 36 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Slager in view Francis, Jr.

Regarding claim 36, Slager discloses a stackable horizontal dispensing container with a pallet base (12), a pallet cover (16, Figure 3, column 7, line 63 to column 8, line 12) and a three sided sleeve that is removably secured to the base and the cover. The segment of sidewalls 14a and 14b indicated at the lead line for 59 that extend into the opening constitute rectangular frame members secured to opposing sides of the sleeve.

Slager does not teach the use of a pallet base and a pallet cover having a lip. Francis, Jr. discloses a container with a pallet base, a pallet cover both having lips (12a and 13a, Figure 1, column 3, lines 36-40) and a sleeve. The lips restrain the sleeve against expansion. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of lips on the pallet base and pallet cover as disclosed by Francis, Jr. in the container disclosed by Slager to restrain the sleeve against expansion.

14. Regarding claim 37, Slager discloses dunnage inside the container.

(10) Response to Argument

Rejection of Claims 1, 3, 4, 9, 10, 15, 16, 17, 24, 25, 27, 45-49, 51-53, 55-58 and 60-62 Under 35 U.S.C. 103(a)

Appellant argues that Slager et al fails to teach a three sided sleeve. In response, Slager et al discloses a container with three sides (77a, 77b, 77c, Figure 3, column 7, line 63 to column 8, line 12). This constitutes a three sided sleeve

Appellant argues that Slager et al does not teach the sleeve is made of corrugated plastic material with vertically oriented corrugations. In response, Slager et al discloses the sides are plastic. Francis, Jr. et al discloses a container with a plastic sleeve constructed from corrugated plastic with the corrugations extending vertically to resist bowing in a direction along the length or width of the container because the corrugated material provides increased resistance to bending (Figures 1-3, column 3, lines 5-25). It would be reasonable to combine the sleeve constructed from corrugated plastic from Francis, Jr. et al with the plastic sleeve of Slager et al to achieve the predictable result identified by Francis, Jr.

Regarding claims 1, 3, 4, 10, 15, 46 and 47-50, applicant argues that Slager et al, Francis, Jr. et al and Silberman do not disclose fasteners extending through a portion of the sleeve to secure the sleeve to a pallet base, In response, Slager et al discloses the container with a sleeve and a pallet base and Francis et al discloses the structure of the sleeve as discussed above. Silberman discloses a container with a fastener at the corners of the container extending through a pallet base, the sleeve (sidewalls) and the cover to secure the parts to form the container (Figures 1-5, page 1, lines 42-71). The fastener extends through channels (12 and 13, Figure 4) which are a portion of the sleeve sides. Thus, Silberman teaches the concept of the fastener extending through a portion of the sleeve securing the sleeve to the base. It would be reasonable to

substitute the fasteners of Silberman for the fastener at the corners of Slager et al (24 of Slager et al) to fasten the cover and sleeve as a unit to the base to improve overall rigidity of the container.

Regarding claims 16, 17, 24, 25, 27, 45 and 56-62 appellant argues that Slager et al, Francis, Jr. et al and Silberman do not disclose fasteners extending through flutes of the sleeve made of corrugated plastic to secure the sleeve to a pallet base, In response, Slager et al discloses the container with a sleeve and a pallet base and Francis et al discloses the use of a corrugated plastic material for the sleeve as discussed above. Silberman discloses a container with a fastener at the corners of the container extending through a pallet base the sleeve (sidewalls) and the cover to secure the parts to form the container as discussed above. In the container of Slager et al as modified by Francis, Jr. et al and Silberman the fasteners extend through the sleeve as taught by Silberman. Since the modified container would have a sleeve made of corrugated plastic, the fastener extending through the sleeve would have to extend through flutes of the sleeve in some manner.

Appellant argues that Slager et al, Francis, Jr. et al and Silberman do not disclose fasteners extending through extending through a portion of the sleeve and through a brace extending between opposed sides of the sleeve as recited in claims 51-55. In response, the container of Slager et al as modified by Francis, Jr. et al and Silberman has fasteners extending through the sleeve, the cover and base at the corners of the container. The lip (22, Figure 3) of the cover of Slager et al constitutes a horizontal brace between opposed sides of the sleeve. The horizontal brace is an

integral part of the cover and, as such, the fastener extending through the cover is also extending through the brace.

Appellant argues that Silberman teaches away from the claimed invention and if one were to incorporate the fasteners of Silberman in Slager et al one would not be able to remove the sidewalls. In response, Silberman discloses a collapsible container (See Figures 6 and 7) in which the fasteners and the sidewalls can be removed. In Slager et al fasteners (17 at the base of the walls) used to secure the sidewalls to the base would have to be removed to remove the walls. Since the fasteners of Silberman have to be removed to collapse the container and Slager et al requires fasteners to be removed to remove the walls, the concept of having to remove fasteners to remove the walls is common to both and it is reasonable to conclude that the walls of Slager et al as modified by Silberman could be removed since the technique is known in both references.

Appellant argues that it would have been illogical to add fasteners extending through the sidewalls as taught by Silberman to the container of Slager et al since Slager et al discloses fasteners such as hinges (17, column 4, lines 32-37) to secure the walls to the container. In response, the fasteners of Silberman extend through the cover, walls and base of the container. The incorporation of the fasteners of Silberman in the container of Slager et al constitutes the use of a known technique to improve a similar device and it would be reasonable to modify Slager et al with the fasteners of Silberman to improve the rigidity of the container and vertical strength of the container, particularly for stacking.

Regarding claims 1, 3, 4, 9, 10, 15, 16, 17, 24, 25, 27, 45-49, 51-53, 55-58 and 60-62, appellant argues that incorporating the frame of Anderson would destroy the purpose of Slager et al to provide a shipping container that is retrofittable to have four sidewalls and access through the top. Appellant also argues that the wrap-around sidewall segments of walls 14a and 14b (Figure 3) of Slager et al are used to keep the product grids in place and eliminate the need for the frame of Anderson. In response, Anderson is analogous art disclosing a similar container with a frame around the open side, which helps to make the container rigid and strong (column 1, lines 64-66 in Anderson). It would be reasonable to incorporate the concept of using a frame around the open side to provide strength and rigidity as an expected result. There would be nothing to prevent retrofitting the container to provide a shipping container having four solid sidewalls and vertical access through the top. In the retrofit, the frame would be removed and the fourth side would provide the added strength and rigidity.

Rejection of Claim 2 Under 35 U.S.C. 103(a)

Appellant argues that the use of a one piece sleeve as disclosed by Budowski et al in the container of Slager et al would destroy the purpose of Slager et al to provide a shipping container that is retrofittable to have four sidewalls and access through the top. Slager et al discloses the retrofit of the container from one having two opposing sides (14a and 14b in Figure 1) to a container having four sides by the addition of two opposing sides (14c and 14d in Figure 4). Appellant argues that the one piece sleeve of Budowski would not allow for the two sides (14c and 14d) to be added to give a four sided container. In response, one purpose of Slager et al is to provide a

horizontal dispensing container that can also be retrofittable to provide a shipping container with four sides, accessed through a top opening. The addition of the two sides (14c and 14d) in Slager et al is the method employed to go from the two sided sleeve of Figure 1 to a four sided sleeve. If one were starting from a three sided sleeve, the embodiment of Figure 3 of Slager et al, there would only be a need to add one wall. The embodiment with the three sidewalls would not be prevented from this function if the three sidewalls were formed as one piece. Budowski teaches the concept of the three sidewalls formed as one piece. The sidewall could still be secured to the base using the attachment method of Slager et al. The use of the concept taught by Budowski does not require adopting all of the structure of Budowski. A fourth sidewall unit would still be capable of being attached to the pallet base using the attachment method in Slager et al. to form the four sided sleeve.

In response to applicant's argument that the Budowski reference is not a shipping container, it is noted that this limitation is not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Rejection of Claims 6, 19, 50, 54 and 59 Under U.S.C. 35 103(a)

Appellant argues that the Slager et al container is designed to hold a product receiving grid and to replace the grids with the pouches disclosed by Bazany et al destroys the purpose of Slager et al. In response, both Slager et al and Bazany et al are horizontal dispensing containers typically used in shipping parts for the auto industry.

See column 1, lines 6-20 of Slager et al and column 1, lines 28-38 of Bazany. Slager et al discloses, in column 3, lines 27-36, that the product receiving grids are removable from the container so that the container can be used for other shipments. Therefore, the use of the container of Slager et al with other dunnage would not destroy the purpose of Slager et al since Slager et al provides for use of the container without the grids. It would be reasonable to utilize the container of Slager et al with pouches as taught by Bazany since both containers are used for the same type of commodities and one would simply be substituting a one known element, the pouches, for another known element, the grid with predictable results.

Rejection of Claims 36 and 37 Under U.S.C. 35 103(a)

Appellant argues that there is no motivation to combine Slager et al with Francis, Jr. et al to provide lips on the pallet base and pallet cover. In response, Slager does not teach the use of a pallet base and a pallet cover having a lip. Francis, Jr. discloses a container with a pallet base and a pallet cover both having lips (12a and 13a, Figure 1, column 3, lines 36-40) and a sleeve. The lips restrain the sleeve against expansion. It would be reasonable to incorporate the use of lips on the pallet base and pallet cover as disclosed by Francis, Jr. et al to provide an element known in prior art to provide a predictable result.

In response to appellant's argument with regard to several of the claims that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or

Art Unit: 3781

motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, all of the references cited are analogous art in that the instant application is to a container and all of the references are similar containers. It is reasonable to conclude that the features relied upon in the references would comprise knowledge generally available to one of ordinary skill in the art.

In response to appellant's argument with regard to several of the claims that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

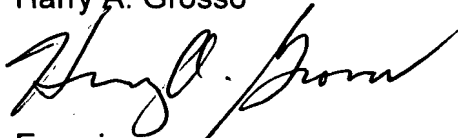
(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Harry A. Grosso

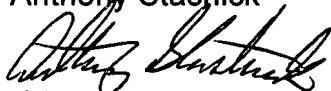


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Art Unit 3781

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